Supreme Court, U. S.
FILED
SEP 18 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1420

LUTHER ALBERT JAMES - - - - **Petitioner**

versus

UNITED STATES OF AMERICA - - **Respondent**

RESPONSE BY PETITIONER TO MEMORANDUM FOR UNITED STATES IN OPPOSITION

CHARLES C. McCONNELL
Suite 1509 Citizens Plaza
Louisville, Kentucky 40202

ROBERT A. KOHN
TAUSTINE, POST, BERMAN, FINEMAN & KOHN
812 Marion E. Taylor Building
Louisville, Kentucky 40202
Attorneys for Petitioner

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

TABLE OF CONTENTS

	PAGE
Table of Citations	iii
Restatement of Positions	1– 2
Argument	3– 9
I. Neither the Plea of Guilty to the Charge of Conspiracy to Engage in Gambling Activities, Nor the Wiretap Information Obtained by the F.B.I. Can Form a Factual Basis for the Assessment Sought To Be Enjoined Herein	3– 7
A. The Plea of Guilty	3– 4
B. Wiretap Information	5– 7
II. The Combined Facts of Petitioner's Plea of Guilty to Conspiracy and the Government's Wiretap Information Do Not Distinguish the Present case From *Pizzarello, Lucia,* and *Shapiro, infra*	7– 9
Conclusion	10
Supplemental Appendix A	11–14
Supplemental Appendix B	15

TABLE OF CITATIONS

Cases: PAGE

Carson v. United States, 506 F. 2d 745 (C.A. 5 1974) 9

Hamilton v. United States, 429 F. 2d 427 (C.A. 2 1970) 9

James v. McKeever, 73-2 U.S.T.C. ¶16,119, (D. Ariz. 1973) 6–7

Lucia v. United States, 474 F. 2d 565 (C.A. 5 1973) (en banc) 2, 7, 8

North Carolina v. Alford, 400 U. S. 25 (1970)..... 3–4

Pizzarello v. United States, 408 F. 2d 579 (C.A. 2 1969), cert. denied 396 U. S. 986 (1969).....2, 7–8

Shapiro v. Secretary of State, 499 F. 2d 527 (C.A. D.C. 1974), certiorari granted *sub nom.* Commissioner v. Shapiro, 420 U. S. 923..... 2, 7

United States v. James, Crim. No. 27962 (W.D. Ky. 1973) 3

Statutes:

18 U.S.C. §2510-2518..... 5

18 U.S.C. §2517(1)..... 6

18 U.S.C. §2510(7)..... 6

18 U.S.C. §2515(1)..... 7

Rules:

56(e) of the Federal Rules of Civil Procedure..... 5

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1420

LUTHER ALBERT JAMES - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - *Respondent*

RESPONSE BY PETITIONER TO MEMORANDUM FOR UNITED STATES IN OPPOSITION

RESTATEMENT OF POSITIONS

In his petition, Luther Albert James, contends that this Court should issue a Writ of Certiorari for the following reasons: (a) That he is entitled to enjoin a $926,000.00 excise tax assessment against him because the assessment is arbitrary and without factual foundation, and (b) the decision of the Court of Appeals for the Sixth Circuit in refusing to grant petitioner injunctive relief, or, in the alternative, requiring the District Court to hold an evidentiary hearing on the aforesaid jeopardy assessment conflicted with precedent established in the Second, Fifth and District of Columbia Circuits on similar allegations and facts.

In its Memorandum in Opposition, the United States contends: (a) That the Internal Revenue Service was entitled to rely on petitioner's plea of guilty to the charge of conspiracy to engage in gambling and on certain alleged information of gambling activity obtained by an FBI agent over a period of nine days during a telephone wiretap conducted in Louisville, Kentucky prior to the assessment and (b) that the claim for injunctive relief by Petitioner is distinguishable in its facts from the cases of *Pizzarello* v. *United States,* 408 F. 2d 579 (C.A. 2 1969), cert. denied 396 U. S. 986 (1969); *Lucia* v. *United States,* 474 F. 2d 565 (C.A. 5 1973) (en banc), and *Shapiro* v. *Secretary of State,* 499 F. 2d 527 (C.A. D.C. 1974), certiorari granted *sub nom. Commissioner* v. *Shapiro,* 420 U. S. 923.

ARGUMENT

The following reply is directed solely to the contentions raised by the United States in its Memorandum in Opposition.

I. Neither the Plea of Guilty to the Charge of Conspiracy to Engage in Gambling Activities, Nor the Wiretap Information Obtained by the F.B.I. Can Form a Factual Basis for the Assessment Sought To Be Enjoined Herein.

A. THE PLEA OF GUILTY

1. On October 29, 1973, in the United States District Court for the Western District of Kentucky, petitioner, pursuant to plea negotiations, entered a plea of guilty to the charge that he conspired to engage

in gambling activities during a period from April 17, 1972, to May 26, 1972. The plea was specifically tendered and entered pursuant to the authority granted by this Court in *North Carolina* v. *Alford,* 400 U. S. 25 (1970), because it was "the most expedient thing . . . to do and not because . . . (Petitioner was) guilty of the charge." The Trial Judge, Honorable Rhodes Bratcher, accepted the plea with that explicit understanding (*United States* v. *James,* Crim. No. 27962 (W.D. Ky. 1973) (Transcript of Excerpt from the proceedings on November 2, 1973) (Supplemental Appendix A, pp. 11-14).

This Court, in *Alford, supra,* enunciated that although most guilty pleas constitute both a waiver of trial and an express admission of guilt, the latter element was not mandated by the Constitution as a prerequisite to the imposition of sentence. This Court recognized that a voluntary guilty plea represents an intelligent choice by the defendant to pursue a course of action which he considers to be in his best interest.

After discussing several *nolo contendere* decisions, this Court, in *Alford, supra,* then added that:

> (t)he fact that (Alford's) plea was denominated a plea of guilty rather than a plea of nolo contendere is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences not the formal categorizations, of state law.

Thus, in *Alford, supra,* the defendant's guilty plea coupled with the protestation of innocence was deemed

to have the same effect before the law as a plea of *nolo contendere* and cannot be used to aid the proof of guilt in another proceeding.

2. Assuming *arguendo* that the plea of guilty constituted information that the petitioner engaged in illegal gambling activities, even so it could have no bearing on any part of the 51 month assessment period except from April 7 to May 26, 1972.

The United States, on pages 2 and 4 of its Memorandum in Opposition, has directly misstated to this Court that:

> "Petitioner's admission by guilty plea in a related criminal case that he was involved in gambling activities *thoroughout the period of the assessment* . . . (supported the assessment") (page 2)
> and
> "Indeed, unlike *Pizzarello,* petitioner admitted by guilty plea that he was involved in gambling activities *throughout the period covered by the assessment.*" (Emphasis added.) (page 4)

Such misstatements of fact are clearly inappropriate in opposition to the present Petition for Writ of Certiorari.

B. WIRETAP INFORMATION

Again, the United States has on page 2 of its Memorandum in Opposition misstated a material fact in support of an untenable argument in contending:

> "However, the assessment was shown to have been based upon . . . (2) the average daily wagers *known to have been placed* with petitioner's gambling operations over a nine day period (Pet. App. 2 a)." (Emphasis added.)

Petitioner's objection to the above statement is two-fold: First, as shown by the record of proceedings of the District Court, the present assessment was made by IRS agent James D. Morgan. It was based substantially, if not wholly, upon an affidavit of F.B.I. agent Anthony Adamski which concerned several wiretap interceptions carried on by the F.B.I. in which Petitioner allegedly participated. The affidavit, rather than purporting to relate actual conversations involving the Petitioner, merely contained conclusary and hearsay statements which, pursuant to Rule 56(e) of the Federal Rules of Civil Procedure, were inadmissible to support a Motion for Summary Judgment in the District Court.

Secondly, and more importantly, the wiretap information cannot be used by the Internal Revenue Service *for any purposes* in the present assessment even though it in fact covered nine days out of a total 51 month assessment period. The wiretapping, through which the United States allegedly obtained information, was supposedly authorized pursuant to Title III of the Omnibus Crime Control and Safe Street Act of 1968, 18 USC § 2510-18 (1970), in connection with an investigation by the F.B.I. into suspected violation of the gambling laws of the United States. However, evidence derived by use of such wiretaps, or the fruits thereof, cannot be employed against petitioner to sup-

port the present assessment because such use violates Congressional policy enunciated in 18 USC § 2517(1) (Petitioner's Appendix E, p. 19a) and also violates petitioner's constitutional right to privacy.

In order to effectively protect an individual's right to privacy, 18 USC § 2517(1) provides:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication, or evidence derived therefrom, may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officer making or receiving the disclosure.

The definitional provision of Title III defines "investigative or law enforcement officer" as:

> . . . any officer of the United States or of a State or political subdivision thereof, *who is empowered by law to conduct investigations of or to make arrests for offenses enumerated in this chapter* . . . (18 USC § 2510(7) (1970)). (Petitioner's Appendix E, p. 17a.) (Emphasis added.)

An agent of the Internal Revenue Service is *not* authorized to receive or use any information derived from use of electronic surveillance conducted under the authority of Title III. Directly on the point is the case of *James* v. *McKeever,* 73-2 U.S.T.C. ¶ 16,119 (D. Ariz. 1973), wherein the Court granted a motion to suppress evidence derived by the I.R.S. from wire-

taps conducted by the local police, on the ground that I.R.S. agents are not authorized to receive such information pursuant to 18 USC § 2515(1), which provides:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial . . . before any court . . . if a disclosure of that information would be in violation of this chapter. (18 USC § 2515.) (Supplemental Appendix B, p. 15.)

Summarizing Petitioner's contentions on the issue of wiretap information:

(a) The information itself did not disclose that Petitioner was engaged in illegal gambling activities; (b) the information concerned at best only a period of nine days out of a total of 51 months (or 1,328 days) and (c) I.R.S. could not use such information in any civil tax proceeding against Petitioner from which it could form any basis upon which an assessment could be made.

II. The Combined Facts of Petitioner's Plea of Guilty to Conspiracy and the Government's Wiretap Information Do Not Distinguish the Present Case From *Pizzarello, Lucia* and *Shapiro, Supra.*

Like Petitioner herein, Pizzarello had, prior to the assessment, been found guilty of the charge that he engaged in illegal gambling activities for a two week period named in a criminal indictment. The Second

Circuit, in reversing a dismissal of Pizzarello's Petition for Injunctive Relief, gave no weight to the criminal conviction either as substantive information of gambling activities or factual proof of those activities because the conviction was based on admissible evidence of only three days activities over the entire assessment period of five years.

In *Pizzarello,* as with the case at bar, the government had attempted to use illegally obtained evidence in the criminal proceeding to support the excise tax assessment. The Second Circuit held that if the evidence was not admissible because it was illegally obtained, it could not form a factual foundation for the assessment. In the case of Luther Albert James, the United States is relying on inadmissible and unconstitutionally obtained evidence and information about the activities of James over a period not in excess of nine days. In both *Pizzarello* and the present case, the bulk of the government's information was obtained either by reason of it being illegally seized or by reason of it being used in violation of the aforementioned statutory prohibitions.

Petitioner has previously indicated his strong reliance upon the Fifth Circuit's *en banc* decision in *Lucia, supra.* The facts indicate that Lucia had pled guilty to a criminal information which had charged him with conspiracy to willfully fail to pay excise tax on wagers for a period of March 1, 1959-January 31, 1964 (a period of time *in excess of the assessment period*). The excise tax assessment was based on uncontroverted proof of acceptance of wagers by Lucia

on one day and projected throughout the assessment period of March 1, 1959-November 21, 1963.

The Court of Appeals for the Fifth Circuit sustained Lucia's contention that his Petition for Injunctive Relief stated a cause of action, in spite of the anti-injunction statute, based on the obvious lack of factual foundation that Lucia had, in fact, engaged in illegal gambling activities over the entire period of the assessment. This result was reached notwithstanding the fact that Lúcia, at no place in his pleadings, alleged that he was not engaged in illegal gambling activities.

The recent case of *Carson* v. *United States,* 506 F. 2d 745 (C.A. 5 1974), discussed the effect of the failure to deny engaging in gambling activities in suits for injunctive relief. It is urged the Carson Court erroneously credited Lucia with having made a sworn denial that he was engaged in gambling activities. A review of the Lucia pleadings indicate that there was no such denial.

The fact that Petitioner does not admit engaging in gambling activities distinguishes his case from *Hamilton* v. *United States,* 429 F. 2d 427 (C.A. 2 1970), strongly relied on by Respondent, where the opinion noted that Hamilton admitted he owed a tax, but attempted only to dispute the amount through injunctive relief.

CONCLUSION

For the reasons stated herein and in the original Brief, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CHARLES C. MCCONNELL
Suite 1509 Citizens Plaza
Louisville, Kentucky 40202

ROBERT A. KOHN
TAUSTINE, POST, BERMAN, FINEMAN & KOHN
812 Marion E Taylor Building
Louisville, Kentucky 40202

APPENDIX

SUPPLEMENTAL APPENDIX A

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

United States of America v. Luther A. James, et al.	Indictment No. 27962

TRANSCRIPT OF EXCERPT FROM THE PROCEEDINGS

Before Honorable Rhodes Bratcher, United States District Judge Western District of Kentucky, at Louisville, Kentucky, commencing October 29, 1973, and ending November 10, 1973, without a jury.

Appearances:

For the United States of America
David Martin, Esquire
James E. Kelley, Jr., Esquire

For the Defendants
Frank E. Haddad, Jr., Esquire
Don Major, Esquire
Stuart Lyon, Esquire
Gary Gardner, Esquire
J. Tim McCall, Esquire
Larry B. Franklin, Esquire
Henry Hughes, Esquire
Dudley Webb, Esquire

Transcript of Excerpt from the Proceedings

The following proceedings occurred in the Court's Chambers at about the hour of 1:45 P.M. on Friday, November 2, 1973, with all Defendants and their respective Counsel together with Counsel for the Government, being present:

Mr. Haddad: For the record, if Your Honor please, on behalf of Luther James, Sam Marrillia and Frank Gaines, they wish at this time to withdraw their plea of not guilty entered to Count II of the indictment and to enter a plea of guilty to Count II, which is the conspiracy count in this indictment.

By the Court: Now, wait a minute here. Now, Frank, you represent which ones now?

Mr. Haddad: Luther James, Sam Marrillia and Frank Gaines.

By the Court: All right. Now what about the others?

Mr. Gardner: Your Honor, on behalf of Raymond Coy—

By the Court: All right. Gardner—Coy?

Mr. Gardner: Yes, sir; and Donald Joseph Hanka—

By the Court: (Interrupting) All right.

Mr. Gardner: (Continuing)—same motion.

By the Court: All right. Now, which other lawyers—

Mr. Haddad: (Interrupting) That's all five of them.

By the Court: Five?

Mr. Gardner: There will be a subsequent motion on another defendant.

By the Court: Oh, yeah. Bird?

Mr. Gardner: Yes, sir.

By the Court: All right. Now, you've indicated that you join with Mr. Haddad in the same motion?

Mr. Gardner: Yes, Your Honor.

By the Court: Now, Mr. James, you've heard the statement made by your attorney?

Mr. James: Yes, sir.

Transcript of Excerpt from the Proceedings

By the Court: You have had adequate opportunity to discuss this matter thoroughly and in detail with your attorney?

Mr. James: Yes, sir.

By the Court: And ask him any questions that you wanted to, desired to, in this case concerning all aspects of it?

Mr. James: Yes, Your Honor.

By the Court: Does he express your wishes concerning the change of your plea?

Mr. James: Yes, sir.

By the Court: You do want to plead guilty?

Mr. James: To the conspiracy.

By the Court: Yes. This is the same understanding, isn't it, as to the dismissal of—

Mr. Martin: (Interrupting) Yes, sir.

By the Court: (Continuing)—of Count I-

Mr. Martin: That is correct, Your Honor.

Mr. Haddad: Yes, sir. These defendants, too, Your Honor, I might add, are all entering this plea pursuant to the authority granted in the Supreme Court in the Alford case because it's the most expedient thing for them to do and not because they're guilty of the charge.

By the Court: (To the Clerk of the Court) Do you have that? All right.

Mr. Gardner: For all defendants, Your Honor.

By the Court: All right. Now, are each of you aware that is the strict prerogative of the Court to pronounce sentence in this case?

(Whereupon, all defendants indicate affirmatively.)

By the Court: And that I am not necessarily bound by the recommendation of the United States Attorney or of your attorneys or anything; it's my exclusive province to strictly pronouce the sentence and determine the sentence?

Transcript of Excerpt from the Proceedings

(Whereupon, all defendants indicate affirmatively.)

By the Court: Are each of you aware that on this count, which is the conspiracy count, No. II, Count II of this indictment, that each of you could receive as much as $10,000.00—up to $10,000.00 in fines and up to five years in the penitentiary or both in the discretion of the Court?

(Whereupon, all defendants indicate affirmatively.)

By the Court: With that information and with that knowledge, it's still your desire to plead guilty?

(Whereupon, all defendants indicate affirmatively.)

By the Court: All right. Let their pleas be changed. I'll accept their change of plea.

(End of excerpt.)

CERTIFICATE

I, Marion D. Odle, Official Court Reporter, United States District Court, Western District of Kentucky, Louisville, Kentucky, hereby certify that the entire proceedings in the captioned case were taken down by me at the time and place stated in the caption; that the foregoing "Transcript of Excerpt from the Proceedings" is a true and accurate transcript of my stenographic notes so taken; that said transcript was prepared under my supervision and direction.

I further certify that I am not related by blood or marriage to any of the parties hereto and that I have no interest in the outcome of captioned case.

Given under my hand as Official Court Reporter this the 18th day of February, 1974, at Louisville, Kentucky.

(s) Marion D. Odle
Official Court Reporter

SUPPLEMENTAL APPENDIX B

TITLE 18, UNITED STATES CODE (1970)

§ 2515. Prohibition of use as evidence of intercepted wire or oral communications

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision thereof if the disclosure of that information would be in violation of this chapter.